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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM R. FRY, ANTHONY J. MARRA, SIDNEY MISHKIN, THOMAS J. DWYER, KATHLEEN B. DWYER, PROGRESSIVE UNITED CORPORATION, and MERIDIAN STRATEGIC INVESTMENTS, L.P., both individually and as class representatives,

Petitioners,

v.

UAL CORPORATION,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* LICENSED TUGMEN'S AND PILOTS' PENSION FUND IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amicus Curiae, Licensed Tugmen's and Pilots' Pension Fund, is a collectively bargained employee pension benefit plan created under Sections 302(c)(5) *et seq.*, 29 U.S.C. §§ 186(c)(5) *et seq.*, of the Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.* The fund operates under the Employee Retirement Income Security

Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1001 *et seq.* It is jointly administered by management and union trustees. The fund owns millions of dollars in the securities of publicly traded companies and has hundreds of participants. The fund wishes to discuss the obligation to disclose a dominant shareholder's opposition to a corporation's announced plans under the Seventh Circuit's new test of "inconceivability" solely from the perspective of the protection of investors and without any stake in the outcome of this case.[1]

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case from Petitioners' Petition For Certiorari.

ARGUMENT

Powerful shareholders continue to become more and more active in pressuring public companies to adopt the shareholders' policies. Corporate managers are often reluctant to make this opposition publicly known because they do not wish to encourage public expectations of plans which they oppose. Nor do they wish to be seen as not being in control of what they often regard as "their" corporations. Often, as in this case, management is able to induce the powerful shareholders to refrain from going public with their opposition before an impasse is reached in the negotiations. The opposition of powerful shareholder groups can significantly change the likelihood of an announced plan being implemented and the public's perception of that plan's likelihood. For example the evidence in the record in this case shows that in the days following the leak of the unconfirmed rumor that Coniston was seeking a tender (December 7-9, 1987), prices surged by more than $5.00 per share of Allegis stock.

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[1] *Amicus Curiae* obtained permission from both Petitioners and Respondent to file this brief. The letters granting that permission are filed herewith.

People who sold their shares while this information was concealed sold at the lower prices prevailing before this leak. If investors know only of the corporation's announcement and have no knowledge that it is opposed by a group with the ability to alter the decision, investors will have been given a very misleading view of corporate affairs and they will be damaged if they make investment decisions based on this misinformation. A securities law rule permitting such deception, like the rule adopted here by the Seventh Circuit is contrary both to our full disclosure system and Supreme Court precedent.

Persons who are seriously concerned with an issue do not always rely on express threats if they feel they can get what they want through advocacy or if they feel they have the ultimate power and can get what they want without threats. The Seventh Circuit's ruling that an issuer need not disclose the opposition of a powerful shareholder unless it was accompanied by a threat and unless that threat showed the announced plan was "inconceivable" (Pet. App. 16A, 17A [2]) deprives investors of information which would show them that the announced plan was unlikely.

The Seventh Circuit refused to follow the Supreme Court's test—that omitted information is material and must be disclosed during an important corporate announcement if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information. . . . *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988) citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 448 (1976). The Supreme Court should require the Seventh Circuit to follow this precedent.

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[2] These references are to the Appendix submitted with the Petition For Certiorari.

CONCLUSION

For the foregoing reasons *Amicus Curiae,* Licensed Tugmen's and Pilots' Pension Fund, requests that the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit be granted and that the Supreme Court either reverse summarily or grant a plenary review.

Respectfully submitted,

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